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# International Law and Regulation of the Internet\*

BY ANTHONY D'AMATO\*\*

## INTRODUCTION

It is nice to see so many of my friends here today. We are all honored by your presence. I would like to talk about the possibility of international regulation, starting off from Jack Balkin's article.<sup>1</sup> He said the ability to express one's views has never been more possible than in this Internet age.<sup>2</sup> But what is at stake is the practical opportunity to get a diverse set of views heard over the din of electronic commerce. Professor Balkin is calling for some kind of regulation.<sup>3</sup> I doubt that that can happen; governments have already tried, but they're finding that this new medium is very hard to control. Perhaps the only way to control it is for all governments to get together and try a world-wide system of controls. What would happen if governments said that all messages that are illegal under international law shall be blocked or, if sent, subject to criminal penalty on the part of the sender?

We might begin by asking what international law right now has to say about government regulation of the Internet.

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\* This Speech was presented as part of the January 2000 annual program of the Section on International Law of the Association of American Law Schools. The other papers for that program were published in the *Kentucky Law Journal's* Symposium on The Internet and International Law in Number 4 of Volume 88. As an integral part of the Section's program, Professor D'Amato's Speech should have been included in the Symposium issue. The editors apologize to Professor D'Amato for not having so included it.

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<sup>1</sup> J.M. Balkin et al., *Filtering the Internet: A Best Practices Model*, CYBER L.J. (Sept. 10, 1999), <http://www.law.yale.edu/infosociety>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

I think international law has a lot to say about the Internet if we look at the structure of international law. I have been doing some recent work on the overall purpose of international law, which I think should not be a controversial proposition: it is to create and maintain the stability of the international nation-state system. International law does this by rules that alleviate international friction and by maintaining a system of economic trade so that individual nations can flourish. Thus, the laws of war, for example, can be interpreted as all being designed to promote systemic stability. This does not mean do whatever is necessary to end a war quickly. For example, terror bombing of civilians may end a war more quickly, or at least sometimes people think so, but it will not create systemic stability. It could create further problems, exacerbate the war, or even create an unstable peace. My conclusion from this research is that the laws of war are an attempt to set up a situation that maintains itself—a cybernetic system whose purpose is to persist through time.

Now, within the laws of war, what do the laws of war say about communications? Interestingly, espionage itself has never been considered illegal under international law. International law does not prohibit an individual nation from punishing a spy, but it certainly allows exchanges by which one side's spy is traded for the other side's. It is not a violation of international law to engage in espionage. Spy satellites have always been kept free of international law interference. International law is saying that communications are preferred. In terms of systemic stability, international law is saying that the more we know about what other nations are doing, the less likely we are going to go to war. Many wars have been fought in the past over mixed expectations and misinterpretations of the intent of neighboring states. Thus the rules of international law favor rigid, defined international boundaries, clear demarcations, and the free flow of information about what is happening behind these national borders. The futile attempt by some nations, during the Cold War, to block radio broadcasts was never itself condoned by international law. The more we retain rigid international boundaries and the more we know what is going on (even through espionage and even through spy satellites), the less likely that we will, by mistake, enter into conflict.

Now, there is some indication in the laws of war that fraudulent communications might be an exception. For example, flags of truce are, of course, favored as a way of stopping hostilities, but the use of a flag of truce as a decoy, as a means to lure the enemy into a state of thinking that they have won, is a war crime. Why? Because it would endanger stability. We need to implement institutions that will end a war and keep the peace, so the laws of international war will disfavor fraudulent use. Now that gets

us back to Professor Balkin's thesis that there should be some kind of regulation. As I said earlier, many countries have tried to regulate the Internet and failed. China has. The United States passed a regulatory statute a couple of years ago. It is very hard to do this because of the world linkage—the World Wide Web. But should there be some kind of regulation for fraudulent use or some kind of regulation to implement diverse voices being heard? Was it a violation of international law for the United States to target the Serbians and Internet facilities during the Kosovo bombing? I believe it was. I do not understand why our military would want to target their communications because the Serbian people through the Internet were getting the only realistic view of what was going on in the war. Every other channel was manipulated but this was one where they could find out what was going on, and to stop them from doing that seems to have been counterproductive. And yet that is what our military did. In discussions I have had with some military leaders, I believe that the NATO policy during the bombing of Serbia is being rethought. Last June, during the bombing, I gave a talk at the Naval War College where I argued that the United States had far more to lose than to gain if disruption of Internet traffic became the norm.

If, looking at the underlying purpose of international law, it favors free communication, what should our policy be—what should we try to achieve—with international law in the days to come?

It seems to me that if you try to regulate for fraud then you open a regime of regulation. If regulation for fraud, or for pornography, or for other kinds of content, appear to be in our short term interest, we may have opened a Pandora's Box in setting up mechanisms that can come back to haunt us. It might be nice to allow for the diverse voices that Jack Balkin talked about. But I think technology is already rising to this challenge. Search engines are getting more and more sophisticated and even if governments try to interfere with the search engines, there is still the possibility of e-mail communication. Somebody sends you a list and says, "look, check out this site, you're going to find something really interesting that's going on." That can be done rather easily, very quickly, and very hard for governments to stop, unless there is a concerted world-wide attempt on the part of governments to regulate the Internet.

In terms of the amount of traffic and traffic jams and everything else, again, I think that can be solved with search engines and e-mail communication. Thus by leaving it open we are finding that problems are being solved even as they appear to be very difficult to solve. The thing that really worries me is the possibility of a concerted world-wide attempt at regulation. If that happens, where do we go? The possibility for experimen-

tation and innovation is gone if all the nations in the world get together to accomplish any task that they desire to accomplish. A "world government," even one that exists only for the purpose of regulating the Internet, can readily amount to thought control. Bureaucrats sitting in Geneva or somewhere will be telling us what we can say to others and what we can't say, what we can receive from others and what we can't receive. There would be no escape from world censorship.

The current content of international law, I have argued, is against governmental regulation of international information flows. But that international customary law can change if all the nations in the world decide to change it; the nations in the aggregate constitute the creator-subjects of international law. International law is a frail reed when compared to the ability of nations acting together to change it.

Some nations have a considerable reason to fear the Internet. We are already seeing instances of a civil uprising in one part of a state being mirrored, within days if not hours, by a civil uprising in a far-away part of the same state. The possibility of concerted civil war is something governments would like to forbid. Also, governments that rely on widespread religion among their citizens to keep the citizens docile are beginning to worry about Internet communications that can easily be received and read by those citizens exposing them to other religions or to viewpoints that challenge religious belief. Just as books on feminism have transformed Western civilizations in the past few decades, so too these books and philosophies will become increasingly available through the Internet to women who in many countries today are treated as second-class citizens. I read recently that traffic on the Internet is now doubling every 100 days. Just think of that statistic: in a relatively short period of time, the entire world will be, as they say, plugged in.

International law has typically not concerned itself with civil wars. International customary law regards changes of government within a nation, even violent changes, as not necessarily implicating international systemic stability. But that has changed in light of the increasing concern of international human rights law with crimes of war. Grave breaches of the Geneva Conventions apply to civil wars (the crime of genocide applies at all times, whether in international wars, civil wars, or peacetime). We may be seeing an increase in the number of civil wars in the near future; many population groups are opting for autonomy rather than maintaining their connection with a remote government. It is likely that the international community will be increasingly implicated in these civil wars just as it was recently drawn into the civil wars in the former Yugoslavia and in East Timor. It may therefore become increasingly important that internal voices

are heard outside a country, and indeed that a two-way flow of information be assured to both sides in any civil war.

Freedom of information can assist in stopping some of the war crimes that go on in civil wars. It certainly makes more transparent what people are doing. It makes it easier to identify individuals. Pretty soon I think everyone in the world will have a web page and may even be able to access it by fingerprint identification through a computer system. As you will recall, the first things the Serbian army did to the people of Kosovo was to take away their identification papers, their automobile licenses, and all paper documents. These were destroyed. New Internet technology may move us to a world where every single human being is identified, either by a personal web page or recorded information in a general data bank that is accessible to everyone. This will make it much harder for military forces to commit war crimes, because their victims will be identifiable.

Governments are going to be downsized a great deal. We are going to find that the very practice of information exchange that is now downsizing businesses and making our corporations virtual corporations, will also eat away at bureaucracies. Bureaucracies are largely there to do sort of Internet work, and they are slowly being replaced by spread sheets, auctions, and data searches. We are going to find that governmental personnel are going to diminish in numbers, and this will have a profound effect on the impact of government upon people's lives. Recall that the biggest bureaucracy in human history was that created to run the Soviet Union. Marxism is a recipe for bureaucracy. As Marxism is discredited, as the Russian Federation has replaced the Soviet Union, so too governments all over the world may become less top-heavy with bureaucrats.

Yet it is possible that as local and national governments downsize, international government will become stronger. I think we must be cautious about the possibility of increased political control over all our lives by a nascent world government.

